IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-284

MARVIN LICHTIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR

WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Petitioner Marvin A. Lichtig respectfully prays that a Writ of Certiorari issue to review the decision by the United States Court of Appeal for the Ninth Circuit affirming his conviction under the following securities statutes: 15 U.S.C. §§77f, 77q(a), 77x, 78ff, 78 l, and 78n.

CITATIONS TO OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix "A". To date, the Opinion is not reported in West's Federal Reporter, Second, although it is expected that it will soon be reported therein.

JURISDICTION

The Opinion in the Court of Appeals was filed on May 15, 1978. A Petition for Rehearing was filed by Petitioner Lichtig on May 30, 1978, which was denied by Order filed on July 21, 1978 (attached hereto as Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Supreme Court should overrule or modify the Allen instruction (Allen v. United States, 164 U.S. 492 (1896)) given to the deadlocked jury below. Because the Supreme Court has not ruled on the Allen instruction in the past 82 years, considerable confusion has resulted among the various Courts of Appeal; thereby prompting calls by judges, lawyers, and legal scholars for this Court to consider this specific question.

B. In light of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) what is the source and nature of the duty imposed by federal criminal statutes upon auditing accountants? Specifically,

> (1) Does the legislative history behind the federal securities statute allow for the criminal conviction of an accountant not for actual knowledge of a fraud, but for "recklessness" in the performance of his audit?

(2) Does Ernst & Ernst v. Hochfelder knock out the legal underpinnings of the "recklessness" jury instruction used in the Court below and in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied 425 U.S. 394 (1976)?

(3) If an auditing accountant can still be convicted for "recklessness", is his criminal recklessness determined by reference to the generally accepted accounting practices within his profession ("GAAP"), or do the federal statutes themselves impose a separate criminal standard independent from GAAP?

(4) If criminal liability for "recklessness" under the securities statutes is determined by GAAP, is it GAAP operative at the time of trial or at the time of the purported crime?

C. Whether a trial court should make a determination of an accountant's criminal guilt under the federal securities statutes for failure to make a more complete audit assertedly required by general accepted auditing standards, when that trial court determination is made

(1) without receiving into evidence any expert testimony as to the generally accepted auditing standards operative at the time of the alleged crime; and
(2) without receiving into evidence over one half of the accused accountant's work papers.

STATEMENT OF THE CASE

The federal Indictment below stemmed from the financial collapse of the Equity Funding Corporation of America in 1973, and essentially alleged a criminal conspiracy to violate various provisions of the 1933 and 1934 Federal Securities Acts (15 U.S.C. §§77q and 78, among others), as well as various allegations describing offenses thereunder. The substantive allegations related to EFCA's financial statements for the years 1964-1972 and alleged that Petitioner Lichtig willfully and knowingly defrauded the investing public by making misleading statements of material facts, or omitting to state material facts which were necessary in order to make the statements not misleading under the circumstances.

In the early 1960's, EFCA sought to establish itself as a highly glamorous purveyor of a novel and innovative investment package involving mutual funds and life insurance. No accounting firms had previously audited an investment organization of this type, and there existed no specific, contemporary auditing standards which had been applied to a company of this nature.

EFCA grew rapidly throughout the mid-1960's and presented to the investing public an amazing rate of financial growth. Beginning in 1968, however, EFCA's management experienced certain problems with regard to the accuracy or adequacy of the internal bookkeeping procedures in relation to the company's true financial status, and in order to maintain the extraordinary growth rate which the investing community fully expected in the 1968 financial statements, EFCA's management engaged in a plan to purposely: (1) deceive and mislead the investing public by creating fictitious income and other journal entries which showed an unrealistic financial status; and, accordingly,

(2) deceive and mislead any independant auditor.

The trial below established to a certainty that EFCA's management relied heavily on an elaborate facade to deceive outside auditors in order to purposely prevent such auditors from discovering the fraud. In fact, quite a number of instances of management deception involved a deliberate failure to even record certain liabilities---a practice which is notoriously difficult (if not impossible) to detect.

During the audit for year-end 1968, Petitioner Lichtig was a junior partner in the accounting firm of Wolfson, Weiner, Ratoff & Lapin, the firm which audited EFCA. Lichtig, although charged with intentional fraud, was apparently convicted of "recklessly" (per the court's instructions to the jury as described at p. 12 , infra) failing to discover or disclose the management's internal bookkeeping fraud, even though the trial below clearly established not only that EFCA's management purposely deceived Lichtig and other independant auditors, but also that no one ever told Lichtig about the fictitious journal entries and other bogus bookkeeping procedures.

Lichtig was also charged with other related offenses allegedly committed after he became a strictly administrative officer of EFCA in May, 1969. The acts committed as an administrative officer were purportedly indictable by reason of Lichtig's "knowledge" he allegedly obtained while an independant auditor of EFCA in prior years.

Trial began on January 7, 1975 and the jury began its deliberation on May 8, 1975. After four and one half days of deliberation, the jury foreman sent a note to the trial judge indicating an impasse in deliberations and stating that the jury stood 11 to 1. The

Court then gave the Allen instruction (described in detail at p. 8-9 , infra) and the jury resumed its deliberation on May 19, 1975. On the afternoon of May 20, 1975, the jury returned a verdict of guilty.

UNDER THE STANDARDS SET FORTH IN RULE 19 OF THE SUPREME COURT RULES, A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE

The Opinion below is in conflict with other Court of Appeals decisions concerning the Allen instruction. The Third and Tenth Circuits have indicated that they will no longer use it at all, and other Courts have allowed conflicting and confusing modifications under certain circumstances. The absence of uniform standards among the circuits and the resulting ambiguities have prompted calls by judges[1/] and legal scholars[2/] for this Court to break its 82 years silence on the Allen instruction and to clarify the situation. Petitioner submits that such clarification should be a Court ruling that the Allen instruction is per se a coercive instruction designed to blast a minority of the jury into

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1/ Judge Wright noted in United States v. Seawell, 550 F.2d 1159, 1167 (9th Cir. 1977) that "in view of the split among the circuit courts [concerning the Allen instruction], a decision by the Supreme Court would be appropriate."

2/ Note, 22 LOYOLA L.REV. 667, 675 (1976). See also law review articles cited at page 11 , infra.

conformance with the majority at the sacrifice of the defendant's right to an uncoerced jury, even if that jury is a hung jury.

This Petition also raises a fundamental federal securities law question not settled by this Court. Although this Court in Ernst & Ernst v. Hochfelder, supra, has found that the legislative history behind the securities statutes will not support recent judcially created civil liability for negligence in past years, this Court has yet to respond to the more serious question of whether the legislative history supports criminal conviction for "recklessness". The federal prosecutors and the Securities and Exchange Commission have convinced the Court below that cases decided before Ernst & Ernst v. Hochfelder, such as United States v. Simon, 425 F.2d 796 (2d Cir. 1969); and United States v. Natelli, 527 F.2d 311 (2d Cir.1975); cert. denied 425 U.S. 934 (1976) allow an accountant to be criminally convicted for "recklessness" in performing his audit. However, no court has construed Simon and Natelli in light of the legislative history analysis contained in Ernst & Ernst v. Hochfelder. Petitioner Lichtig asks this Court to do so.[3/]

Although this Court stated in footnote 12 of Ernst & Ernst v. Hochfelder, that it was leaving open "the question of whether, in some circumstances reckless behavior is sufficient for civil liability. . .", this question should not be left open in the more serious case of criminal liability, where the standards of scienter are to be more strictly and carefully enforced and where due process rights arise.

[3/] The Court below did not even mention Ernst & Ernst v. Hochfelder in its opinion.

Another important question is raised by the fact that Lichtig was convicted of rendering an inadequate audit, despite the fact that

(1) the government's own witnesses testified that over one half of the accountants' work papers were not admitted into evidence, and

(2) the government failed to present any evidence as to GAAP operative at the time Lichtig rendered his audit (1968-1969).

The Court of Appeals should not have sanctioned a conviction based upon such a departure from the accepted and usual evidentiary method for establishing the commission of a securities crime.

ARGUMENT

I

THE ALLEN INSTRUCTION GIVEN BELOW RESULTED IN A VIOLATION OF PETITIONER LICHTIG'S CONSTITUTIONAL RIGHT TO A JURY DELIBERATION UNCOERCED BY THE JUDGE, EVEN IF THAT DELIBERATION NEVER REACHES AN UNANIMOUS VERDICT.

After being informed that after four and one half days of deliberation the jury was deadlocked 11 to 1 and could not reach an unanimous verdict, the Court delivered the following instruction as allowed in Allen v. United States, 164 U.S. 492 (1896).

> "This is an important case. The trial has been expensive in time and money to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, must be disposed of some time . . . . "They are matters which along with others and perhaps more obvious ones

remind us how desirable it is that you unanimously agree on a verdict. . ." (emphasis added).

After one day of deliberation, the jury foreman informed the court that a verdict could be expected within "a reasonable time." The jury returned a verdict of guilty the next day.

The precise language of the Allen instruction given to the jury below was found in United States v. Harris, 391 F.2d 348 (6th Cir. 1968) to be unduly coercive upon the jurors and to constitute a violation of the defendant's constitutional rights. The Harris Court specifically agreed that a statement by the Judge that a lawsuit must be decided at sometime

> "is an unauthorized version of the Allen charge and is calculated to have a coercive effect on the jury. . . . [T]he statement is not completely accurate. The possibility of this agreement by the jury is part of the jury system. . . . [T]he possibility of . . . lack of the unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For a Judge to tell a jury that a case must be decided is, therefore, not only coercive in nature, but misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury." 391 F.2d at 355.

Courts of Appeal have stricken down several Allen instructions for similar reasons. See e.g. United States v. Anguilo, 485 F.2d 37 (1st Cir. 1973); United States v. Burley, 460 F.2d 998, 999 (3rd Cir. 1972); United States v. Thomas, 449 F.2d 1177, 1182-1183 (D.C.Cir. 1971);

United States v. Fioravanti, 412 F.2d 407, 416 (3rd Cir. 1969) cert. denied, 396 U.S. 837 (1969); Williams v. United States, 338 F.2d 530, 533 (D.C.Cir. 1964); Green v. United States, 309 F.2d 852, 856 (6th Cir. 1962).

This Court, while never expressly reputiating Allen v. United States since its decision in 1896, did in Jenkens v. United States, 380 U.S. 445, 446 (1965) reverse the conviction obtained after the trial court instructed the jury that it had to reach a decision. This Court expressly held that ". . .the Judge's statement had the coercive effect attributed to it."

Furthermore, the Courts of Appeal have held that when the trial judge knows that the jury is split 11 to 1, and the jury knows that the trial judge knows, the Allen instruction clearly coercive and prejudicial to the defendant's constitutional right to rely on the possibility of a hung jury. See e.g. United States v. See, 505 F.2d 845 (9th Cir. 1974); cert. denied, 420 U.S. 992 (1975); Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), cert. denied 411 U.S. 986 (1973); United States v. Burley, supra, and United States v. Rogers, 289 F.2d 433, 435 (4th Cir. 1961).

Finally, even the Court below has expressly noted that the Allen instruction has "an inherently coercive effect", United States v. Seawell, 550 F.2d 1159, 1162 (9th Cir. 1977) and has on several occasions disapproved of its use. See e.g. United States v. See, supra, 505 F.2d at 851; United States v. Contreras, 463 F.2d 773 (9th Cir. 1972) ("We have a profound feeling that it [the Allen charge] was coercive upon the jury.") 463 F.2d at 774); Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969) (we "doubt that it is really any longer adviseable to give the Allen instruction at all. . .") and Tolan v. United States, 370 F.2d 799 (9th Cir. 1967), cert. denied 387 U.S. 392 (1967).

cert. denied, 387 U.S. 392 (1967).

Several law review articles have criticized the coercive effect of the Allen instruction, noted the confusion among the circuits, and have pointed the way to the solution: this Court should break its 82 year silence on Allen v. United States. See e.g. 22 LOYOLA L.REV. 667 (1976); Note, The Allen Charge: Recurring Problems and Recent Developments, 47 N.Y.U.L. REV. 296 (1972); Note, On Instructing Deadlocked Juries, 78 YALE L.J. 100 (1968); Note, Due Process, Judicial Economy and the Hung Jury; A Reexamination of the Allen Charge, 53 U.VA.L.REV. 123 (1967); and Commit, Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge, 31 U.CHI. L.REV. 386 (1964).

Furthermore, change in the Allen instruction has been called for by attorneys and judges (See, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY §5.4 (Draft Approved by the American Bar Association Project on Minimum Standards for Criminal Justice in 1978); SUPPLEMENT TO THE REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, 2, 3 (1969).

And yet, despite all of the above authorities, including the above cited Ninth Circuit decision, the Court below limited its analysis of the Allen instruction to only two paragraphs appearing at pages 1584-1585 of Appendix "A" hereto, which contain an almost facetious observation

> "The cases which discuss the assumed effect of the Allen charge are all appealed by defendants who were convicted. Defendants who have been acquitted after giving of the charge have not complained."

II

THE TRIAL COURT'S JURY INSTRUCTION THAT SPECIFIC CRIMINAL INTENT COULD BE IMPLIED FROM "RECKLESSNESS" IS WITHOUT ANY BASIS IN THE FEDERAL SECURITIES STATUTES.

As noted by the Court below (see Footnote 28 of Appendix A hereto), the Trial Court instructed the jury that the defendant's willfulness and knowledge, which is required for criminal conviction, may be inferred upon a finding that the defendant

> "recklessly states as facts matters of which he knew he was ignorant . . . . [that is,] reckless, deliberate indifference to or disregard for truth or falsity . . ."

Both in trial and on appeal, counsel for petitioner Lichtig objected to the use of this instruction on the following grounds:

1. There is no statutory authority for "criminal recklessness" in the securities area;

2. There is no case law authorizing this jury instruction, especially in light of Ernst and Ernst v. Hochfelder, supra; and

3. To the extent that "recklessness" is determined by reference to the generally accepted accounting practices ("GAAP" also referred to as "GAAS"), the jury instructions failed to specify just what those standards were, and no evidence was presented by the prosecution as to the GAAP or GAAS operative at the time petitioner Lichtig allegedly acquired criminal scienter (1968-1969). The Court below admitted at page 1609 of Appendix A hereto that the only evidence as to GAAP was the standards issued in 1973 by Committee on Auditing Practice,

American Institute of Certified Public Accountants ---which was after the EFCA fraud was disclosed to the public. And yet at pages 1600, 1608 and 1610-1611 of Appendix A, the Court below refers to Lichtig's failure in 1968-1969 to comply with GAAP and GAAS not issued until 1973.

Such ex post facto evaluation of criminal scienter is reversible error.

The importance of this "reckless disregard" issue is highlighted by the following undisputed facts, which establish that Lichtig's guilty verdict was based on the "recklessness" instruction and was not based upon any finding that Lichtig actually knew about the EFCA fraud.

1. The perpetrators of the EFCA fraud, Evans, Levin, Sultan and Lowell testified at trial and Goldblum later testified that Lichtig did not actually know about the EFCA fraud and that great efforts were made to hide the fraud from the auditors.

2. That the only knowing participants in the EFCA fraud in 1968-69 (the key years for Lichtig's criminal scienter) were Goldblum, Lowell, and Evans. (See also trial judge's summation at page 1608 of Appendix A hereto, which also establishes Lichtig's ignorance of the EFCA fraud in its early 1968-1969 stage.)

3. That in the beginning of 1969, Goldblum made Lowell, and not petitioner Lichtig, the man to present figures to the auditors (see footnote 24 of Appendix A hereto). From that point on, Lichtig handled only administative functions at EFCA.

4. That Lichtig's criminal scienter for all years covered in the Indictment was based upon knowledge he acquired as an auditing accountant in 1968-1969 and his failure in later years to do certain things as an EFCA employee.

The Court below stated at pages 1609 and 1611 of Appendix A hereto that United States v. Natelli, 527 F.2d 311 (2nd Cir. 1975), cert. denied, 425 U.S. 394 (1976) and United States v. Simon, 425 F.2d 796 (2nd Cir. 1969) justified the "recklessness" jury instruction given below. However, that is not correct. As was brought to the attention of the Court below, the jury instruction during the trial in Simon included the express admonition on three separate occasions that the jury must find knowing cancealment with "intent to defraud" in order to convict. The government in presenting the jury instruction below left out that key language from the Simon instruction.

United States v. Natelli, supra, does not justify the "recklessness" jury instruction below because of two reasons:

1. Ernst and Ernst v. Hochfelder, supra, has knocked out the legal underpinnings justifying the Natelli "recklessness" instruction; and

2. Even if Ernst and Ernst v. Hochfelder, did not exist, the theory of criminal liability imposed against Lichtig below is a new twist and extension of Natelli that goes beyond what the statutesand the Constitution allow.

The justification of the "recklessness" instruction in Natelli is based upon a superstructure of Rule 10b-5 civil case law which has been rejected by this Court. In Ernst and Ernst v. Hochfelder, this Court determined that the legislative history behind the federal securities statutes did not support the judically created Rule 10b-5 theory of civil liability for negligence. Petitioner submits that stricter standards of statutory interpretation must apply for criminal liability, and pursuant to those standards, there is no authority for putting someone in jail under the federal securities statutes for "recklesness".

Furthermore, even if this Court had not adopted this new stricter standard in construing and enforcing the federal securities statutes, the "recklessness" jury instruction given below is still not justified by United States v. Natelli, supra. This is because the theory of criminal liability asserted against Lichtig below is broader and more "negligent" oriented than the theory asserted against the Natelli defendants.

It must be remembered that the Natelli Court stressed that its ruling did not apply to an auditor's general duties,

> "but what these defendants had a duty to do in these unusual and highly suspicious circumstances." 527 F.2d at 323.

The "unusual and highly suspicious circumstances" did not exist in the case below. A comparison of the facts and criminal liability duties asserted below and against the Natelli defendants evidences this crucial difference. The Natelli Court made clear at 525 F.2d 316 that the accountant was not being charged with a criminal violation with respect to his decision to permit an adjustment to be made on the audited company's book after the close of the fiscal year, which as a result showed an additional 1.7 million dollars in sale listed as "unbilled accounts receivable." What the Natelli accountants were charged with and convicted on was their failure in the following year to make any adjustments concerning that 1.7 million dollars accounts receivable figure even after the accountant actually knew that the company had written off over one million dollars of this 1.7 million dollars sales figure. Thus, the Natelli Court made clear at 527 F.2d 316-317 that Natelli was knowingly concealing a loss of over one million dollars and was intentionally burying "the retroactive adjustment which should have shown a material decrease in earnings for the fiscal year. . ."

This is not the situation in the case below. As noted at pages 1601-1602 of Appendix "A" hereto, the Court below found that Lichtig was responsible for two "judgmental" errors concerning the 1968-69 EFCA audit. (One error was the listing of one account receivable, "recips", under another category of accounts receivable, the funds due to EFCA from its clients under various EFCA funding programs. The other error was failure to adequately confirm certain collateral stated by Templeton to be held by EFCA on funded loans.) Both of these errors were in the nature of the judgmental classification error made by the Natelli accountants, which the Natelli Court expressly held was not being asserted therein as a criminal violation.

Nowhere is it stated in Appendix "A" hereto, and nowhere did the evidence in the Court below establish, that Lichtig was in the same actual knowledge situation that existed in Natelli. In order for the case below to be similar to Natelli, the evidence below would have to show that at some point after the 1968-1969, Lichtig acquired actual knowledge that the "recips" income did not exist, or that the "collateral held by EFCA" in the FLAR account did not exist.

Because the evidence below never established that Lichtig actually knew that these items did not exist, then the theory of criminal liability asserted against Lichtig below can only rest upon the theory which the Natelli Court expressly stated at 527 F.2d 316 did not apply to the Natelli accountants: a judgmental decision as to how to describe certain income and assets of the audited corporation. It must be stressed that the government's own expert witness below, Mr. Grosman, testified that Lichtig's handling of the "recips" and the FLAR collateral was a "judgmental" matter.

To make matters even worse, Lichtig's "judgmental" decision concerning the 1968 - 1969 EFCA audit was not even judged in light of GAAP or GAAS existing at that time. The only evidence introduced by the government was certain standards which had been issued by the Committee on Auditing Procedure, American Institute of Certified Public Accountants in 1973, the year of the collapse and disclosure of the EFCA fraud. Needless to say, after the EFCA fraud was revealed to the public, the GAAP and GAAS were radically changed to standards far higher than those existing at the time of Lichtig's purported "crime".

If the government should argue in its oppostion to this Petition that Lichtig was also convicted for conducting an inadequate audit, then this Court should consider the fundamental question as to how an accountant can be tried and convicted for an inadequate audit when the government's own witnesses testified that over half of the accountants' work papers were never submitted into evidence. In light of the fact that the EFCA fraud proceeded for years in fooling many accountants from, for example, the SEC, the IRS, Haskins & Sells, Peat Marwick and Mitchell, Seidman & Seidman, and Coopers & Lybrand) how can an accountant be put into a jail for "not doing more" when the evidence introduced against him did not include over half of his work papers? Clearly the evidence leaves open the reasonable doubt that Petitioner Lichtig did do more, but like all those other accountants who were never indicted, more just was not enough due to the tremendous lengths the EFCA management went to to hide the fraud---a ploy that succeeded for years.

III

PETITIONER LICHTIG HAS BEEN TRIED AND CONVICTED UNDER AN UNCONSTITUTIONAL CRIMINAL STANDARD OF "RECKLESSNESS".

Basic constitutional rights questions arise when the government succeeds in obtaining the conviction of people by taking the superstructure of the Rule 10b-5 case law concerning civil liability for negligence and recklessness, and transfers into a theory of criminal liability.

This Court has already expressed in Ernst & Ernst v. Hochfelder and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), that the scope of civil liability for violation of the securities statutes was being expanded beyond what the statutes authorized and was causing uncertainty among accountants and other people in the securities field as to the scope of civil liability for their action. If such considerations justify the results in Ernst & Ernst v. Hochfelder and Blue Chip Stamps, then they a fortiori justify granting the instant Petition for Writ of Certiorari, because criminal liability is at stake.

In Screws v. United States, 325 U.S. 91 (1945), this Court grappled with this fundamental question of whether a defendant is being tried and convicted under a sufficiently specific criminal standard. In that decision, it was noted that the

> "constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition. This requirement is met when a statute prohibits only 'willfull' acts. . . 'Willfully' merely adds

> a certain state of mind as a prerequisite to criminal responsibility of the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is, which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening . . ., then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. 'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, it is not rendered sufficiently definite by that unknowable having been done 'willfully'. It is true also of a statute that cannot lift itself up by its bootstraps." 325 U.S. at 103-104, 151-154 (emphasis added).

Despite the assertions of the Securities and Exchange Commission to the contrary, the executive branch of the United States Government has also supported this fundamental requirement for specific criminal standards.

> "This is the basic meaning of 'justice' in criminal cases. One who believes that criminals should be dealt with 'justly' believes, among other things, that punishments can be inflicted on criminals without great danger of revolt or

> rebellion, providing sufficient advance notice is given in the form of rules. Especially in Western society, with long traditions of barring ex post facto legislation [there are] elaborate systems for warning citizens that nonconformity of certain kinds will have punishment as its consequence. . . . An important function of the criminal law, so far as maintaining consent of the governed is concerned, is providing the 'advance notice' necessary for justice." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, 25, 45-56 (1967) (emphasis in original).

Petitioner Lichtig's conviction for "recklessness" raises these precise fundamental constitutional issues. Therefore, Petition for Writ of Certiorari should be granted.

IV

CONCLUSION

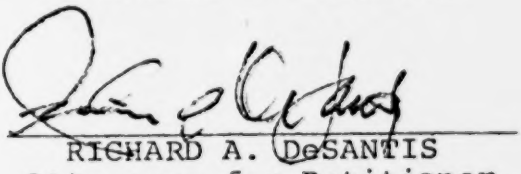
Regardless of whether this Court ultimately supports Lichtig's position, this Petition should be granted because his conviction raises unique and fundamental constitutional questions.

For the foregoing reasons, this Court should grant a writ of certiorari.

Dated: August 17, 1978.

Respectfully submitted,

LAW OFFICES OF
RICHARD A. DeSANTIS



RICHARD A. DeSANTIS
Attorneys for Petitioner

APPENDIX A

The Opinion of the Court
in United States v. Julian S.H. Weiner,
578 F 2d 757 has not been filmed.

RECEIVED

JUN 2 1978

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. JULIAN S. H. WEINER; MARVIN AL LICHTIG; and SOLOMON BLOCK, Appellants.	)	No. 75-2973 ORDER

Appeal from the United States District Court for the Central District of California

Before: CHOY and GOODWIN, Circuit Judges, and THOMPSON*, District Judge.

On May 26, 1978, appellants Weiner and Block filed a petition for rehearing with a suggestion for rehearing en banc.

On May 30, 1978, appellant Lichtig filed a petition for rehearing.

The panel as constituted in this case has voted to amend the opinion filed May 15, 1978, in the following particulars:

At page 10, line 5, of the typewritten opinion (page 1587 of the printed slip opinion, top of right-hand column), starting with "Lichtig's present claim", delete the remainder of the paragraph and substitute the following language:

> Lichtig claims he discovered the existence of the agreement on May 7, 1976, almost a year after the conclusion of the trial. However, the record on appeal does not contain any

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX "B"

> evidence of the agreement or of the government's knowledge that such an agreement existed. The issue is therefore not properly before us.

At page 35, line 20, of the typewritten opinion (page 1601 of the printed slip opinion, line 10, right-hand column), delete the period after the word "statement" and insert before "The untrue" the following language:

> which stated that an independent audit of the financial statement using GAAS had found it to reflect truthfully the financial condition of the company and its operations and to have been prepared according to GAAP.
>
> Count 76 charges that Lichtig and another defendant "wilfully made and caused to be made untrue statements of material fact" or "wilfully omitted and caused to be omitted statements of material fact" in the December registration statement.

At page 36, lines 15-18, of the typewritten opinion (page 1602 of the printed slip opinion, lines 12-16, left-hand column), delete the two sentences beginning "The SEC had previously ruled" and ending "to receive such money."

At page 48, line 11, of the typewritten opinion (page 1608 of the printed slip opinion, line 4, right-hand column), substitute "Lichtig" for "Block".

With the opinion so amended, the panel has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the proposed amendments, and of the

suggestion for rehearing en banc, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

It is ordered that the opinion in this case is amended as set forth above; the petition for rehearing filed by appellant Lichtig is denied; and the petition for rehearing filed by appellants Weiner and Block is denied and their suggestion for rehearing en banc is rejected.

AFFIDAVIT OF SERVICE IN COMPLIANCE
WITH SUPREME COURT RULE 33(3)(c)

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1901 Avenue of The Stars, Suite 700, Los Angeles, California 90067.

On August 18, 1978, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the parties in this action pursuant to Supreme Court Rule 33(1) and (2)(a) by placing true copies thereof in an envelope addressed as follows:

Solicitor General Department of Justice Washington, D.C. 20530	U.S. Attorneys Office 312 North Spring Street Los Angeles, California 90012

and by then sealing said envelope and depositing same, with postage thereon fully prepaid, in the United States mail at 1901 Avenue of The Stars, Level "A", Los Angeles, California 90067.

Defendants Weiner and Block are not Petitioners herein, but may file their own pleading.

Joy Rosemarie Grako
JOY ROSEMARIE GRAKO

Subscribed to and sworn to before me this 18th day of August, 1978

Edith Guay
Notary Public in and for the State of California, County of Los Angeles